No. 06-1633

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IN THE

Supreme Court of the United States

FAITH CENTER CHURCH EVANGELISTIC MINISTRIES and HATTIE HOPKINS,

Petitioners,

v.

FEDERAL D. GLOVER, MARK DESAULNIER, JOHN M. GIOIA, MILLIE GREENBERG, JOHN W. SWEETEN, ANNE CAIN, PATTY CHAN, LAURA O'DONAHUE and GAYLE B. UILKEMA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. THE GOVERNMENT MAY NOT EXCLUDE RELIGIOUS SPEECH CHARACTERIZED AS "WORSHIP" FROM A FORUM GENERALLY OPEN TO THE PUBLIC.

The Ninth Circuit ruled that the First Amendment allows Contra Costa County to ban certain religious expression whenever it amounts to "religious worship" from a forum the County has generally opened to community groups for a broad spectrum of expression. Religious speech that does *not* amount to "religious worship" is permitted in this forum. The County argues in its Brief in Opposition (Opp.) that its discriminatory policy is constitutional because the Petitioners labeled their own expression as "praise and worship." Opp. at 1, 5, 6, 10. But whether a speaker describes its own expressive activity as "worship," or a government official assigns that label, it is equally unconstitutional to exclude a category of otherwise constitutionally protected speech solely because of its theological significance. The decision below is both flatly incompatible with this Court's First Amendment jurisprudence and squarely in conflict with the decisions of other circuits. This Court should grant review.

The County would have this whole case hinge on the irrelevant detail that petitioners described their expressive activity as "praise and worship." But the County's position makes no sense at all. First of all, as Judge Tallman stated in his dissent, "words on a flyer make no difference in the disposition of this case." App. 43a – 44a. The First Amendment rights at issue here do not turn on whether Faith Center characterized its speech as "praise and worship" according to its own theological perspective, nor would this characterization relieve the County of its independent obligation to administer its speech forum in a constitutional

manner. A private group's idiosyncratic label for its expression does not control the contours of its First Amendment libe rties. Most importantly, otherwise constitutionally protected expression – singing, reading, petitioning – cannot be expelled from a forum open to precisely such activities merely by slapping the label, "worship" upon the expression. *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995).

Second, the central (and erroneous) legal premise of the Ninth Circuit's decision was that the category of speech that qualifies as "worship" is constitutionally distinguishable from other, otherwise (in secular terms) indistinguishable speech. That this notion of worship as a separate category of speech is of dubious sensibility was explained by this Court in *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981). And the arbitrariness of such a distinction was illustrated well by the Ninth Circuit when it validated the County's bizarre determination that Hattie Hopkins could give her morning speech on "The Making of a Intercessor" because it was merely "religious speech," App. 26a-27a, but that she could not give her afternoon speech on "Positioning Yourself for Victory" because Faith Center had used the words, "praise and worship" to describe that afternoon session. App. 28a.

Third, even if there were such a thing as "pure religious worship"[1] that could be segregated from expressive religious activities, petitioners' expression would not fall into that supposed category. A sermon by Hattie Hopkins certainly qualifies for forum access. App. 5a.

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[1] The County repeatedly implies that petitioners conceded their speech to be "pure religious worship." *E.g.*, Opp. at 3, 5, 8, 9. That phrase, however, is the Ninth Circuit's, not petitioners'.

The Ninth Circuit believed that its decision was justified by this Court's use of the term, "mere religious worship" in *Good News Club*, 533 U.S. at 112 n.4. That case, of course, rejected precisely the proposition the Ninth Circuit embraced: that otherwise eligible speech may be excluded from a forum simply because it also constitutes "worship." *Id.* As in *Good News Club*, petitioners' "activities do not constitute mere religious worship, divorced from any teaching of moral values." *Id.*

As Judge Tallman stated in dissent below, "[r]egardless of what Faith Center chooses to print on its flyers, or what it chooses to call its activities, worship cannot logically be parsed from all other forms of religious expression in the way the County intends." App. 44a.

II. THE SECOND CIRCUIT'S 2003 DECISION IN *BRONX HOUSEHOLD OF FAITH* PRESENTS A CIRCUIT SPLIT WITH THE NINTH CIRCUIT DECISION BELOW THAT WAS NOT ALTERED BY THE SECOND CIRCUIT'S JULY 2, 2007 DECISION.

The Ninth Circuit's decision here is in conflict with the Second Circuit's decision in *Bronx Household of Faith v. Board of Education of the City of New York*, 331 F.3d 342 (2d Cir. 2003) ("*Bronx Household II*"). *See* Pet. at 13-16. In that case, the Second Circuit upheld a preliminary injunction against a Board of Education policy that barred religious services at the New York City public schools during nonschool hours.

The County seeks to distinguish this case from that of *Bronx Household II* by asserting that the latter case did not involve "pure religious worship," but instead entailed the combination of worship with teaching and other religious speech. Opp. at 7. But the present case likewise involves a

combination of worship with teaching and other religious speech. The brochure states:

> PRAISE & WORSHIP: 1:00PM - 3:00PM
> SPECIAL SPEAKER: DR. HATTIE HOPKINS
> SERMON: "Position Yourselves for Victory"

Declaration of Danielle R. Merida, Exhibit A, District Court Docket Entry #30. Thus, the distinction the County urges between this case and *Bronx Household II* is instead a point of similarity.

The County next seeks to distinguish this case from *Bronx Household II* by insisting that the Second Circuit had no occasion to address the question of "pure religious worship," as the facts of the case did not call for such an evaluation, but that such a question is squarely presented in this case because Faith Center "itself conceded that its activities constituted pure religious worship." Opp. at 7-8. This is an equivocation. That is, the County would have this Court conclude that because the entry "Praise and Worship" appeared on Faith Center's brochure describing its afternoon seminar session, the organization was thereby stipulating for purposes of unanticipated future litigation that its speech is to be categorized in the esoteric, nouveaux (and conceptually dubious) constitutional speech category of "pure religious worship," which is to be distinguished from other religious speech.[2] The absurdity of this premise is apparent.

The County also argues that a circuit split no longer exists because the Second Circuit's most recent decision on

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[2] The County attempts a similar attribution of significance to an isolated, four-word response of counsel at a hearing before the district court. Opp. at 5. That this is altogether incapable of carrying the weight the County would assign it requires no elaboration. Judge Tallman makes this same point in his dissent. App. 44a-45a n.2.

July 2, 2007, in *Bronx Household of Faith* v. *Board of Education of the City of New York*, __ F.3d __, 2007 WL 1880477 (2d Cir. 2007) ("*Bronx Household III*") has vacated the injunction affirmed in *Bronx Household II*. This is not only incorrect factually,[3] it misses the relevant consideration bearing on the question of a continuing circuit split. First, the recent decision did not even reach the merits. One judge voted to affirm, one voted to reverse, and one thought the case was not ripe. Hence, the recent panel had nothing to say about the vitality of the prior *Bronx Household* precedent. Second, the July 2 panel could not overrule the prior panel decision in any event, as only this Court or an en banc panel has the power to do so. *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004).

Therefore, a circuit split continues to exist between the Second Circuit's 2003 decision in *Bronx Household of Faith* and the Ninth Circuit's decision here in *Faith Center* on whether the government may exclude religious "worship" but allow religious "speech" in a forum generally open to the public for expressive activities.

III. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF SEVERAL CIRCUITS THAT HAVE FOUND DESIGNATED PUBLIC FORA WHERE EVEN MORE RESTRICTIONS WERE IN PLACE THAN ARE PRESENT IN THIS CASE.

This Court should also grant review to resolve a circuit conflict over whether a forum generally open to the public is a "designated public forum" (as several circuits have held) or a "limited forum" (as the Ninth Circuit held in this case). In a

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[3] The two judges who formed the majority result to vacate the permanent injunction stated specifically that the preliminary injunction remained in effect. *Bronx Household III*, 2007 WL 1880477 at 22 (opinion of Judge Leval); *id.* at 35 n.2 (opinion of Judge Calabresi).

"designated public forum," content-based exclusions are evaluated by the compelling state interest standard, as in *Widmar v. Vincent*. The County does not even attempt to defend its exclusion of "religious services" under that rigorous test.

The County accuses Faith Center of urging a "brand new rule of forum law," *viz.*, that a "limited forum" classification only be available when the government allows but one form of speech into a forum. Opp. at 15. While this mischaracterizes Faith Center's argument (*see* Pet. at 29), it ironically draws attention to the converse error committed by the County: the County categorically excludes only *one* form of speech, and then insists the forum be considered "limited." The County, following the Ninth Circuit, thus proposes to make the very constitutional violation it commits (the discriminatory exclusion of religious services from a forum open to the public) the basis upon which to downgrade the forum designation (from "designated" to "limited"), and thereby relieve itself of the responsibility to provide a compelling state interest for its discrimination.[4] Such an end-run analysis would ensure that the government will never be subject to the compelling state interest test for its content-based exclusion of speech from a forum it operates – a conclusion entirely incompatible with governing Supreme Court and circuit court jurisprudence.

The County downplays the fact that it allows, by policy and practice, a broad range of expression in its library meetings rooms. "It is the policy of the Contra Costa County Library to encourage the use of library meeting rooms for

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[4] For purposes of this discussion, petitioners utilize the terms "designated forum" and "limited forum" in the manner adopted by the Ninth Circuit, while acknowledging that this usage is not accepted by all circuits, and perhaps even by this Court. *See* Brief of Amicus Curiae Cato Institute Supporting Petitioners at 14-17.

educational, cultural and community activities." App. 108a-109a. The County has allowed the Democratic Party "to present issues and candidates to members," Pet. at 2, and has admitted such groups as the Sierra Club, Narcotics Anonymous, and many others. Pet. at 3.

The County has really only excluded one type of expression: "religious services." To be sure, there are regulations governing the use of the forum. For example, the Library allows community groups to meet for free unless they charge admission or solicit for funds. App. 109a. (In the latter case, the County simply charges the organization to use the library meeting rooms. *Id.*) And the Library limits schools to holding only "special meetings, programs or activities," not regular classes. *Id.* But these are not exclusions of particular *content*. Indeed, even *religious* speech is allowed so long as it is not deemed a forbidden "service." App. 26a-27a.

Such a forum would plainly qualify as a "designated public forum" in the First, Third, Fourth and Fifth Circuits. In each of the cases cited in the Petition, *see* Pet. at 23-28, circuit courts struck down exclusions of religious expression under the designated forum standard. The County tries to distinguish these cases, especially the Third Circuit's decision in *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir. 1990). In that case, the Third Circuit ruled that the governmental entities had created designated public forums despite *greater* restrictions on content than the County imposes here, and declared unconstitutional the restriction on religious worship. *Id.* at 1383.

Additionally, the Tenth Circuit, in *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), found that a forum opened for discussions and presentations "of interest to senior citizens," was a designated public forum by

policy and practice. *Id.* at 1276. "The City has permitted lectures and classes on a broad range of subjects by both members and non-members at its Senior Centers." *Id.* at 1278. The Tenth Circuit declared unconstitutional the City's policy prohibiting use of the senior centers "for sectarian instruction or as a place for religious worship." *Id.* at 1277.

In short, the decision below creates a multi-circuit split on this additional, recurring important free speech issue.

CONCLUSION

As Judge Walker said in his opinion in the July 2, 2007 decision in *Bronx Household of Faith*, "there is no doubt that this particular dispute - no stranger to the Supreme Court and now focused on worship - would benefit from a more conclusive resolution by that Court."[5] Petitioners respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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[5] *Bronx Household of Faith v. Board of Educ. of City of New York*, __ F.3d __, 2007 WL 1880477 at 35 (2d Cir. 2007).